STATE OF MICHIGAN

COURT OF APPEALS

INDUSTRIAL DRIVE L.L.C.,

Plaintiff-Appellant,

v

RICHARD WERNER and SCANS ASSOCIATES, INC.,

Defendants,

and

JUDITH K. WERNER, RJS, and SANDRA L. GRETTENBERGER,

Defendants-Appellees.

UNPUBLISHED
October 7, 2010

No. 291460
Oakland Circuit Court
LC No. 2008-091751-CK

Before: TALBOT, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Plaintiff Industrial Drive, LLC appeals as of right both the January 27, 2009 opinion and order granting defendants Judith K. Werner, Sandra L. Grettenberger, and RJS, summary disposition and denied plaintiff summary disposition, and the July 28, 2008 order granting RJS's motion to set aside default. Because we are not persuaded by any of plaintiff's arguments on appeal, we affirm.

On December 23, 1976, RJS was formed as a Michigan limited partnership with the character of the business being "to invest in real property for the production of income to the partners." RJS was comprised of two general partners, Richard and Judith, and one limited partner, Bryant Wulff, trustee for the trust of Grettenberger. This matter arises out of Richard pledging partnership property for a certain debt to plaintiff. Plaintiff claimed it was an innocent third party and could rely on Richard's apparent authority as a general partner and as an agent of the partnership because it had no knowledge that Richard lacked such authority. Defendants-Appellees claimed that Richard was without actual authority to pledge RJS's property for his own debt to plaintiff and that the transactions relinquishing RJS's asset to pay for the debt of an individual member was not carrying on the business of the partnership in the usual way. The trial court agreed with Defendants-Appellees and granted Judith and Grettenberger summary disposition pursuant to MCR 2.116(C)(10), denied Industrial's request for summary disposition

pursuant to MCR 2.116(C)(10), and granted RJS summary disposition pursuant to MCR 2.116(I)(2). Plaintiffs now appeal as of right.

On appeal, plaintiff asserts several arguments: (1) the trial court erred when it found that defendant Richard Werner, as a general partner in RJS, did not have actual or apparent authority to assign, pledge, or convey a condominium that was property of the partnership; (2) plaintiff's fraud and promissory estoppel claims should not have been dismissed because Richard made representations on behalf of RJS and plaintiff relied on the representations to its detriment, thus, it would be unjust to allow RJS to profit from its misrepresentations; (3) the trial court erred by treating Judith, Grettenberger, and RJS's response to plaintiff's motion for summary disposition as a motion for summary disposition brought against plaintiff by Judith and Grettenberger pursuant to MCR 2.116(C)(10); (4) summary disposition pursuant to MCR 2.116(I) with regard to Judith and Grettenberger would have been improper because plaintiff never requested summary disposition with regard to them; (5) the trial court erroneously concluded that plaintiff had the opportunity to respond to Judith and Grettenberger's "motion" when, in fact, plaintiff was not given the required 21 days to respond and was only allowed to file a five page reply brief; and, (6) the trial court erred in deciding the motion before discovery was completed because had plaintiff been allowed to depose Richard, Judith, and Grettenberger, the deposition testimony may have shown that Richard had the actual and apparent authority to sell the partnership's property.

We review a decision on a motion for summary disposition de novo. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). We review the record in the same manner as the trial court to determine whether the movant or nonmovant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998); MCR 2.116(I)(1) and (2). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). In evaluating a motion for summary disposition brought under this subsection, a reviewing court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Coblentz*, 475 Mich at 567-568. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving or nonmoving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); MCR 2.116(G)(4); MCR 2.116(I)(1) and (2); *Coblentz*, 475 Mich at 568. We review issues of statutory construction de novo. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526-527; 672 NW2d 181 (2003).

"The authority of an agent to bind the principal may be either actual or apparent." *Meretta v Peach*, 195 Mich App 695, 698; 491 NW2d 278 (1992). Actual authority is defined as "[a]uthority that a principal intentionally confers on an agent or authority that the agent reasonably believes he or she has as a result of the agent's dealings with the principal." Black's Law Dictionary (8th ed). "Apparent authority may arise when acts and appearances lead a third person reasonably to believe that an agency relationship exists." *Meretta*, 195 Mich App at 698-699. "Apparent authority must be traceable to the principal and cannot be established by the acts and conduct of the agent. In determining whether an agent possesses apparent authority to perform a particular act, the court must look to all surrounding facts and circumstances." *Id*. at 699 (internal citation omitted).

Pursuant to MCL 449.9(1) and (2), an agent must be carrying on the business of the partnership in the usual way, and if the agent is not carrying on the business of the partnership in the usual way, the partnership is not bound by the agent's actions unless the partners authorized the agent's actions. Thus, although any partner of a partnership can convey title of property that is in the partnership's name, the partnership can recover such property if the partner was not carrying on the business of the partnership in the usual way or if the partner had no authority to act and the person with whom the partner was dealing had knowledge of that fact. MCL 449.10(1); MCL 449.9(1). Hence, whether plaintiff had knowledge that Richard lacked the pertinent authority is only relevant if Richard was, in fact, carrying on the business of the partnership in the usual way.

The record reveals that Richard was not carrying on the business of the partnership in the usual way when he purported to relinquish RJS's condominium. The certificate of partnership provided that the character of the business was "to invest in real property for the production of income to the partners." Richard was purportedly using the asset of RJS to pay for the outstanding debt of defendant Scans Associates, Inc., that Richard wholly owned. Hence, transferring RJS's real property to Industrial to cover the outstanding debt of Scans did not result in investing in real property for the production of income to the partners of RJS.

In addition, MCL 449.9(3)(a) provides that "[u]nless authorized by the other partners . . . , 1 or more but less than all the partners have no authority to" "[a]ssign the partnership property in trust for creditors." Further, "[i]t is well settled that where a note or other security is given in the name of the firm by one partner for his private debt, or in a transaction unconnected with the partnership business, and known to be so by the person taking it, the other partners are not bound unless they have consented." *Towle v Dunham*, 84 Mich 268, 279; 47 NW 683 (1890). Here, Richard essentially used the condominium as security for his personal debt, as the owner of Scans, in a transaction unconnected to RJS's partnership business, and it is clear from the record that plaintiff knew that RJS's asset was being pledged for Scans debt to plaintiff. Hence, pursuant to the language of MCL 449.9(3), as well as the Court in *Towle*, Judith and Grettenberger were not bound by Richard's transaction unless they consented to the transaction, which the record reflects they did not.

The record also reveals that Richard had no apparent authority to conduct the transaction because there was no apparent authority traceable to the principle that was established by something other than the acts and conduct of the agent. *Meretta*, 195 Mich App at 699. Plaintiff never contacted RJS or spoke with any of its members other than Richard. Importantly, however, Judith and Grettenberger allegedly signed documents indicating that Richard had the authority to execute the pertinent transactions. The signing of these documents was the only instance of any alleged contact by the other partners in RJS. Pursuant to Judith and Grettenberger's signatures on the documents, Richard may have appeared to have apparent authority to execute the pertinent transactions. But, based on the undisputed representations of Judith and Grettenberger in their affidavits, Judith and Grettenberger's signatures were, in fact, forged. The rule with regard to forgeries is generally that "[f]orged papers cannot be made the basis of a recovery, either at law or in equity, against the supposed maker, or those in good faith holding and owning the genuine papers." *Lee v Kellogg*, 108 Mich 535, 536; 66 NW 380 (1896). Thus, because the signatures were forged, although it may have appeared to plaintiff that Richard

had authority to execute the documents, he did not in fact have such authority, and the forged documents cannot be used to bind the partnership to the transactions.

Further, the record displays that Judith and Grettenberger did not make promises or representations to plaintiff giving rise to claims against them for fraud or promissory estoppel. The only partner of RJS who made promises or representations to plaintiff was Richard and, as set forth above, those promises and representations could not, and did not, bind the partnership. Thus, the trial court properly dismissed plaintiff's fraud and promissory estoppel claims against RJS. See *Hord v Environmental Research Institute (After Remand)*, 463 Mich 399, 404; 617 NW2d 543 (2000), where Court indicated that in order to sustain a claim of fraudulent misrepresentation, the defendant must have made a material representation. See also *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 686-687; 599 NW2d 546 (1999), where the Court indicated that is a promise is required for a viable claim of promissory estoppel.

Next, plaintiff contends that the trial court mistreated Judith and Grettenberger's response to plaintiff's motion as being a motion brought pursuant to MCR 2.116(C)(10) because Judith and Grettenberger did not move for summary disposition against plaintiff pursuant to that court rule. Plaintiff has not established error because the trial court was properly entitled to conclude that Judith and Grettenberger were entitled to summary disposition as a matter of law pursuant to MCR 2.116(I)(1) ("If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay.") Indeed, the analysis to be employed by the trial court under MCR 2.116(I)(1) and (2) follows in a fashion parallel to the MCR 2.116(C)(10) analysis. At worst then, any error on the part of the trial court was simply a matter of mislabeling. And, even if this could be considered error, "[t]his Court will affirm where the trial court came to the right result even if for the wrong reason." *Fisher v Blankenship*, 286 Mich App 54, 70; 777 NW2d 469 (2009).

Plaintiff also argues that the trial court erroneously concluded that plaintiff had the opportunity to respond to Judith and Grettenberger's motion when, in fact, it was not given the required 21 days to respond to Judith and Grettenberger's motion and was only allowed to file a five-page reply brief. But plaintiff does not indicate how any further response to Judith and Grettenberger's request for summary disposition would have been substantially different than the reply it filed to RJS's motion for summary disposition. Plaintiff had opportunities to make its arguments in a reply brief, a supplemental brief, at the hearing on the motion for summary disposition, and subsequently in its motion for reconsideration. On this record plaintiff is not entitled to any relief on the ground that it did not have an opportunity to respond.

Plaintiff argues that the trial court should have determined that summary disposition before discovery was completed was improper because deposition testimony may have shown that Richard had the actual and apparent authority to sell the condominium. "[A] party opposing a motion for summary disposition because discovery is not complete must provide some independent evidence that a factual dispute exists." *Michigan Nat'l Bank v Metro Institutional Food Serv, Inc*, 198 Mich App 236, 241; 497 NW2d 225 (1993). In this case, it was clear that Richard did not have the actual or apparent authority to enter the pertinent transactions and plaintiff did not set forth any evidence to demonstrate that any genuine issue of material fact existed. *Id.* "A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under

our court rules." *Maiden*, 461 Mich at 121. Thus, plaintiff's contention that deposition testimony *may* have resulted in a genuine issue of material fact regarding whether Richard had actual or apparent authority was not sufficient to prevent the granting of summary disposition to defendants-appellees.

Finally, plaintiff argues that the trial court should not have granted the motion to set aside RJS's default because no good cause was shown to set aside the default and RJS did not demonstrate a meritorious defense. "The question whether a default or default judgment should be set aside is within the sound discretion of the trial court and will not be reversed on appeal absent a clear abuse of that discretion." *Park v American Cas Ins Co*, 219 Mich App 62, 66; 555 NW2d 720 (1996). "A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed." MCR 2.603(D)(1). "Good cause is established by (1) a procedural irregularity or defect, or (2) a reasonable excuse for not complying with the requirements that created the default." *Barclay v Crown Bldg & Dev, Inc*, 241 Mich App 639, 653; 617 NW2d 373 (2000). Moreover, a lesser showing of good cause will suffice when the meritorious defense is strong. *Id*.

In this case, Richard was personally served with the summons and complaint for RJS on May 23, 2008. Richard did not answer the complaint on behalf of RJS so a default was entered against RJS on June 16, 2008. Although Richard could accept service on behalf of RJS because he was a partner in RJS, MCR 2.105(C)(1), Richard was the partner responsible for forging the signatures of the other partners on the third amendment to the lease and the consent to lien. Further, it was Richard's representations to plaintiff that resulted in plaintiff's filing suit against RJS when RJS failed to transfer title of the condominium to plaintiff. Thus, Richard was the source of the wrongdoing in this case. Judith and Grettenberger did not receive their copies of the summons and complaint until June 2, 2008. The record does not reflect that, at that time, Judith and Grettenberger had knowledge that Richard was previously served on RJS's behalf. Further, although Greg Guggemos, the attorney for Judith, Grettenberger, and RJS, apparently indicated that he would accept service of process on behalf of Judith and Grettenberger, Guggemos indicated after the default that it was his intention at all times to also be representing the interests of RJS. Judith and Grettenberger had until June 30, 2008, to answer the complaint, and presumably they also believed RJS had until that time as well. Based on the foregoing, there was good cause for setting aside the default because a reasonable excuse existed for not complying with the requirements that created the default. Indeed, the only partner who knew RJS was served was engaged in a pattern of wrongdoing against the partnership and other partners. *Barclay*, 241 Mich App at 653. Furthermore, RJS had a strong meritorious defense to the complaint because Richard had no actual or apparent authority to execute the pertinent transactions on behalf of RJS. Thus, because RJS had a strong meritorious defense, a lesser showing of good cause suffices in this matter. *Id*. Consequently, the trial court did not abuse its

discretion by setting aside the default against RJS because good cause existed for setting aside the default and RJS provided a meritorious defense to the complaint.

Affirmed. Defendants-Appellees, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Michael J. Talbot
/s/ Patrick M. Meter
/s/ Pat M. Donofrio